IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

TROY CANNON CONSTRUCTION COMPANY, INC., a Kansas Corporation,
Petitioner,

v.

DALLAS JOB; GRAND ELECTRIC COOPERATIVE, INC., a Corporation, and ASSOCIATED ENGINEERS, INC., a Montana Corporation,
Respondents.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

The parties will be referred to as they are in the Petition for Writ of Certiorari.

Petitioner raises three questions the answers to which it contends requires the granting of its Petition for a Writ of Certiorari.

Grand will undertake to answer the first two questions propounded by petitioner, leaving the third to Job, as it does not involve an issue with which Grand is concerned.

(1) Does the Federal Court have the power to refuse to apply relevant decisions from the forum state's highest court which control the manner of construction of an ambiguous indemnity agreement?

Far from refusing to apply relevant decisions of the forum state's highest court, the Court of Appeals carefully

reviewed the South Dakota decision touching on the matter of the interpretation of indemnity contracts (see second full paragraph page 40, Petition for Writ of Certiorari) and concluded that the law of South Dakota does not differ from the general law as revealed by numerous cases cited in its decision. The Court stated:

> "* * * it [the court's opinion in Schull Construction Co. v. Koenig, A. D. S. D. 224, 124 N. W. 2d 559, 562 (1963)] but echoes statements contained in decisions of this and other courts relating to the construction of indemnity agreements where the indemitee asserts a right to recover for loss occasioned at least in part by his own negligence". Petition, pg. 42.

Petitioner's assertion that had the case been tried across the street in the South Dakota Circuit Court, the result would have been different is a most unwarranted assumption unsupported by any decision of the South Dakota Supreme Court.

Petitioner bases its argument upon the premise that the indemnity provisions of the contract are ambiguous. The Court of Appeals simply failed to find any ambiguity. It held that by the plain language of the contract, Troy agreed to indemnify Grand for any loss caused or contributed to by the negligence of Troy. Its holding in that regard was not inconsistent with the decision of the District Court whose Finding of Fact No. XXI was as follows:

> "Under Troy's contract with Grand, Troy agreed to hold Grand harmless from any and all negligence for injuries to persons happening by reason of any negligence by Troy. It is clear from the language of the contract, the purposes of the agreement and all the surrounding facts and circumstances that Troy and Grand intended, at the very least, that Troy should indemnify Grand to the extent that Troy's negligence contributed to the injury" (Record pg. 83).

Nor is it contrary to the verdict of the jury. Interrogatories No. 1 and 3 were as follows:

> "Was the defendant Grand through its officer, agents, servants and employees negligent?
>
> "Was the defendant Troy through its officers, agents, servants, and employees negligent?"

and were both answered in the affirmative (Record pg. 74).

The Circuit Court simply failed to agree with the trial court as to the proper conclusion to be drawn from such finding, concluding that Grand should be indemnified in full and Associated indemnified not at all, instead of both Grand and Associated being, in effect, each partially indemnified.

(2) Does a Court Appeals have the power to override Findings of Fact by a court and jury, vacate the trial court's judgment and impose upon the litigants its own concept of the evidence?

As above pointed out, the Court of Appeals has not overridden any Findings of Fact of the trial court or the jury. The jury found that both Grand and Troy, through their officers, agents, servants, and employees were negligent. The District Court found that each of the defendants were one-third negligent. The Court of Appeals gave full credence to said findings, but concluded that Grand's negligence was not of such a character as to bar recovery under the terms of the indemnity provisions of the contract.

Neither the jury or the court made any finding as to the character of Grand's negligence that would be inconsistent with the right of Grand to indemnity on common law or quasi-contractual principles.

The interrogatories to the jury did not require or permit of a finding as to the nature or character of Grand's

negligence. The court found Grand negligent in the following particulars:

> "(a) In permitting and allowing Troy to continue on the contract when it knew or reasonably should have known that Troy was incompetent and composed of insufficient and inexperienced personnel to adequately and safely do the work.
>
> (b) In failing to take any effective remedial steps when Grand knew or reasonably should have known that Troy was pursuing unsafe and haphazard procedure in connection with the clearance of the line before energization.
>
> (c) In energizing the line when it knew or reasonably should have known of the unsafe and confused and uncertain procedures being followed in the clearance of the line before energization.
>
> (d) And was otherwise guilty of acts of negligence" (Record pgs. 81 and 82).

Findings (a) and (b) are clearly findings of passive negligence. Finding (c) actually does not differ from findings (a) and (b). It contains no suggestion that Grand performed its task of energizing the line in a negligent manner. The negligence on Grand's part, as found by the court, consisted in its failure to insist that the "confused and uncertain procedures being followed in the clearance of the line before energization" be remedied by Troy.

The Court of Appeals held:

> "A construction which would not permit indemnity would render the hold harmless clause without meaning or significance. The clause's presence indicates that the parties meant Grand to have something by it which it would not have had without it",

thereby clearly indicating that the indemnifying provisions of the contract did, in its opinion, grant Grand rights it would not have had without it. It is also clear from the Court's opinion that even if it had felt that the character of Grand's negligence was such as to preclude indemnification on quasi-contractual principles, it would nevertheless have granted indemnity on the bases of the indemnity provisions of the contract.

CONCLUSION.

The Court of Appeals clearly did not refuse to apply relevant decisions of the forum state's highest court, nor did it override findings of fact by the trial court or the jury and impose upon the litigants its own concept of the evidence. No constitutional questions are involved nor has it been shown that the decision of the Eighth Circuit Court of Appeals in this case is in conflict with the decisions of other Circuit Courts of Appeals. Only questions of state law are involved, which have been thoroughly and painstakingly considered by the Court of Appeals.

The Petition for Writ of Certiorari should be denied.

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